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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1938.

THE MAYTAG COMPANY, Petitioner,
vs.
HURLEY MACHINE COMPANY and ELECTRIC HOUSEHOLD UTILITIES CORPORATION, Respondents.

THE MAYTAG COMPANY, Petitioner,
vs.
EASY WASHING MACHINE CORPORATION, Respondent.

Nos. 76, 77.

GENERAL ELECTRIC SUPPLY CORPORATION, Petitioner,
vs.
THE MAYTAG COMPANY, Respondent.

No. 661.

REPLY FOR THE MAYTAG COMPANY, PETITIONER (PLAINTIFF) IN NOS. 76 AND 77; RESPONDENT (PLAINTIFF) IN NO. 661.

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2 Robinson on Patents, p. 481 20
2 Robinson on Patents, p. 145 22

REPLY FOR THE MAYTAG COMPANY, PETITIONER (PLAINTIFF) IN NOS. 76 AND 77; RESPONDENT (PLAINTIFF) IN NO. 661.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Statement.*

It is fair to say that the defendants would have these cases decided without reference to the factual situation the records disclose, and which they do not deny. The fact is that the introduction of the plaintiff's novel gyrator machine created a revolution in the washing machine business. The merits and advantages of that machine compelled the Easy and Hurley Companies, notwithstanding their great re-

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*** Petitioner in No. 661 filed no brief as petitioner as required by the rules of this Court "three weeks before the case is called for hearing"—the joint brief filed on behalf of petitioner in No. 661 and respondents in Nos. 76 and 77 was served in New York on April 11, and did not reach Chicago where this reply was prepared until April 12, less than a week before the day of the hearing.**

Due to this it has been impossible to condense our reply or arrange it as we should have done had defendants' counsel complied with the rules.

sources and large sales and widespread advertising of their vacuum cup and cylinder type machines, to largely discard those machines, eat the words of criticism of the Maytag machine they had uttered, produce the gyrator machine they had ridiculed, and describe it to the public in terms equivalent to those used in the Snyder patent. In doing so they assured the public and their potential customers definitely and enthusiastically that their machines were new and novel in structure and also in mode of operation, which mode they described as water action in the place of rubbing (Plaintiff's main brief, pp. 50-52).

And when the great General Electric Company, enticed by the opportunity for a profitable market, desired to add the washing machine to its line of electrical household devices, its skilled engineers, whose close contact with the Maytag machines had thoroughly informed them of the merits and popularity of that machine, chose to adopt Snyder's gyrator machine in preference to all other types. It followed his patent so closely that infringement could not be seriously denied. General Electric also asserted that the old rubbing method was entirely and forever replaced by the water action of this novel machine (Plaintiff's main brief, pp. 52-3).

Defendants' counsel, faced with the necessity of evading the consequences to their clients of these unlawful appropriations of plaintiff's invention, would relegate these facts to obscurity and have this court permit this appropriation to continue, and the defendants escape their liability, on the grounds—

(1) That Snyder was anticipated by old patents for machines which failed and were abandoned, which dis-

closed structures and modes of operation which the trial judges who examined them and saw them operate have found are very different from Snyder's, and

(2) That plaintiff did not disclaim a claim of its patent never held invalid by any court, and which not only is by law **deemed** to be different from the claim actually disclaimed, but has been **held** by four judges to **be actually** for a **different** method than that of the claims disclaimed.

At the outset it should be observed that defendants admit infringement of claims 26 and 29 of the Snyder patent (Brief, p. 25). (Judge Otis and the Court of Appeals for the Eighth Circuit held that the defendants infringed each of these claims and there is no holding to the contrary.) By making this admission defendants agree that each of their machines and the parts thereof are so constructed, arranged and operated as to carry out the washing operations so clearly depicted in each of them. To this extent at least their argument agrees with the statements made in defendants' advertisements that their machines operate in exactly the same manner as is disclosed and claimed by Snyder. (See our main brief, pp. 50-4.)

In the face of defendant's concession of infringement of claim 23 in the Eighth Circuit Court of Appeals (100 F. (2d) 218, 219) defendants here contend, as they did unsuccessfully before Judge Byers (11 F. Supp. 743, 757) and Judge Otis (Decree, App. 56), that claim 23 should be limited to a dish shaped impeller, even though the claim contains no such limitation. This contention is made despite the fact defendants make no contention that their machines do not operate

in the same way and secure the same results as the structure covered by that claim.

There are three striking and significant omissions from defendants' brief:

1. Defendants make no attempt whatever to point out wherein the evidence does not fully sustain the findings of the trial courts in each of these cases with respect to the disputed issues of fact concerning the date of invention, construction and operation of the Snyder machine, the defendants' machines, and those of the prior art.

2. Defendants make no attempt to show why they discarded their old type machines and appropriated the Snyder invention and made the same claims for their infringing machines so fully set forth in the Snyder patent after housewives throughout the country came to demand that type of machine in preference to all others.

3. Defendants' brief makes no reference to the advertising put out in connection with the sale of each of their machines (see our main brief under (c) pp. 50-55) and the legal significance thereof, which so clearly refutes the thesis on which their entire argument is predicated, to-wit, that the Snyder machine and defendants' machines do not wash clothes by water action as distinguished from the rubbing, pounding, dragging and squeezing of all previous types.

To illustrate, the General Electric Company makes the following statements in their advertising—

> **"In a few minutes it can prove to you that the rubbing and pommeling methods of 3,000 years have been wrong!** . . . See the **almost miraculous** way the exclusive G-E Activator **forces suds**

through fabric, makes suds and water currents do all the work."

"It washes by water action alone—with no harsh scrubbing." (P. Main Brief, pp. 52-3.)

"Basic Ground of Factual Disagreement" Between the Second and Eighth Circuit Courts of Appeals.

Despite the various ramifications of defendants' brief, they have substantially focused the issue in their black type footnote on page 6, in which they say that **plaintiff has improperly included the machine of the Davis patent No. 1,240,826 of 1917,** made by the 1900 Company, **in the class of "rubboard machines,"** with the assertion that this classification is established by "undisputed testimony," and that the inclusion of these machines in that class is the principal point of plaintiff's argument, definitely disputed by defendants and by evidence of overwhelming weight. **They then assert, and we think quite properly,**

> "The point [thus] in question is, in fact the **basic ground of factual disagreement** between the decision of the Second Circuit Court of Appeals against the patent and the decision of the Eighth Circuit Court of Appeals in favor of the patent."

We have examined the records in the instant cases with the utmost care, and fail to find any evidence, to say nothing of any of "overwhelming weight," that places this machine in anything other than the **"rubboard class."**

Illustrations of the undisputed evidence of both plaintiff's and defendants' witnesses which places this machine in the rubboard class are found in the record.

Defendants' Witnesses.

Behan, who was General Manager and later President of the 1900 Company, which made the machines of the Davis patent, testified (GE 368):

> "I was familiar with the various types of washing machines from 1906, in a general way."

And he especially mentions the Dietz rubboard (sometimes called scrubboard by him) type machine, a cut of which is reproduced in our main brief, p. 23, opposite the machine made by his company under the Davis patent. His testimony conclusively shows the exact similarity in construction and operation between these two machines and that they are clearly of the same rubboard type. He testified (GE 374):

> "XQ. 190. Yesterday you testified about the rubboard type machines made by the Dietz Company. Does this cut that I hand you correctly represent that type of machine which is generally known as the rubboard type?
>
> "A. That was known to me as the rubboard type.
>
> "XQ. 191. That is the type that the Dietz Company was making, with which you were familiar, were you not, for years?
>
> "A. Yes, sir.
>
> "XQ. 192. And in that machine, as generally in rubboard type machines, the rubboards were vertically movable in the cover so that they would come down in contact with the clothes in operation, isn't that true?
>
> "A. That was the general principle."

And (GE 367):

> "XQ. 113. They [Davis patented machines] were substantially identical, so far as construction and operation are concerned, with what is

known quite generally throughout the trade as the rubboard type of machine?

"A. Yes."

Doughty, referring to defendant's Exhibit 2-A, the Davis machine (now defendant's Exhibit 27) says (GE 346-7) that in this machine—

> "In the Form 1 machine the agitator was slidably mounted through the cover, . . . It was free to go down as far as it wanted to go, would go. In the actual operation well, it would go down until it contacted the clothes—the resistance of the clothes counteracted its tendency to go down-varying distances, depending upon the loading of the machine.
>
> "XQ. 131. So as the rubboard moved down it would contact and compress the clothes between the rubboard and the bottom and sides of the tub?
>
> "A. Yes.
>
> "XQ. 132. And in that way got the rubbing action on the clothes both top and bottom and sides?
>
> "A. Yes."

And again (GE 349-50):

> "There was very poor circulation of clothes, practically none, when the machine was ordinarily loaded."

Doughty testified that when, writing to his company's patent attorney, Mr. Clark, on March 23, 1921, he said (GE 350) that he was seeking to avoid

> "an action which occurs in the top agitator machine which causes the agitator to sink in the water and restrict the free movement of the clothes"

he was referring to the Davis machine in which, as his letter states, the agitator,

> "which is only held in position by floating upon

> the water, or by the supporting effect of the clothes, is drawn down with the result of compressing the clothes, restraining their free movement and increasing the power required to operate the washer." (D. E. 38, GE 1725.)

Davis, patentee of the Davis patent, when confronted with the above letter written by Mr. Doughty, testified (GE 316) that he heartily endorsed "everything that is said there by Mr. Doughty, who wrote that letter."

Doughty after examining carefully the Davis patent said with respect to the description of the circulation found in the specifications of that patent (GE 360):

> "I do not believe that the machine in actual practice would create those currents except when the agitator was held up from descending, or I might say it might create those currents at the instant that the agitator, or while the agitator was at the surface of the water, but the moment it settled down into the clothes I think those currents would disappear."

Mrs. Laura Wensley, a housewife who testified on behalf of defendants in the Easy-Hurley cases with respect to this Davis rubboard machine, which she used, says of its rubboard construction (which she called a "dolly", EH 472-3):

> "when the dolly goes down it pushes the water up, because it is heavy . . . this arrangement shoves the clothes back and forth, and that is what does the washing . . . these corrugations on the bottom . . . rub the clothes more . . . the rubboard rubbed the clothes back and forth . . . So that dolly engaged the clothes all the time that it worked."

Defendants' expert Taggart testified (GE 261) that in the Davis machine—

"the clothes in the machine are washed if at all by rubbing, pounding, squeezing, and dragging."

and (GE 262)—

"By the method of rubbing, pounding, squeezing, and dragging as distinguished from mere circulation of water."

Plaintiff's Witnesses.

Walter Bones, who has been familiar with all types of washing machines in his territory since 1908, testified (GE 88) that he came in contact with the 1900 rubboard type machine which is illustrated by three cuts on Plaintiff's Exhibit 5C (GE 607, Of. 88), and said:

"I saw these machines in actual operation. You put in a load of clothes, and you let the lid and the washing disc down on top of the load and the disc worked its way down on to the clothes, rubbed and dragged and scrubbed the clothes against the side walls and the bottom of the tub as well as against the disc rubbing member with its cleats. I would say there was no water circulation in that machine."

(See also his testimony as to the rubboard type machines, GE 84.)

Kenerson, who had repeatedly operated these Davis machines, thoroughly agreed with the testimony of defendant's expert Taggart that in these machines the clothes are washed by rubbing, pounding, squeezing and dragging them, and that the Davis machine "operates substantially as the old rub boards did" (GE 529).

See also the uncontradicted testimony of Yeomans in the Easy-Hurley cases (EH 306).

We have specifically set out the above testimony, for the convenience of the Court, to show that on this "basic ground of factual disagreement" between the decisions of the Second and Eighth Circuit Courts of Appeals, all of the facts support the findings of Judge Otis that **the Davis machine was of the old rubboard type**, and that the Court of Appeals very properly approved his findings. The Court should observe that when defendants come to discuss this "basic ground of factual disagreement" on pages 71-4 of their brief, they fail to cite any testimony to support their extravagant statement (footnote, p. 6) that evidence of overwhelming weight supports this contention. The foregoing well illustrates the erroneousness of many unsupported statements in defendants' brief.

From the bottom of page 11 through page 16 of their brief, defendants attempt to carry the inference that the reason why their counsel spent so much of the trial court's time in the Brooklyn Edison case in attempting to prove that clothes could not be washed by water action, as distinguished from effectively rubbing, scrubbing and **flexing them by mechanical means,** was due to "considerable obscurity" in the Snyder patent specifications, they insist that The Maytag Company shifted its position with respect to the Snyder invention in its opening proofs and took the position in rebuttal that (p. 13)—

> "in the operation of the machine of the Snyder patent the fabrics are not suspended by the washing fluid out of contact with the impeller blades, but do go down between the blades and into contact with them so that the clothes are washed partly by water action and **partly by rubbing the clothes against the moving impeller blades.**"

This statement is entirely gratuitous for no such position was ever taken by the plaintiff in any of these cases. It has consistently insisted throughout this litigation, as it does here, that the clothes in plaintiff's and defendants' machines embodying the Snyder invention are washed by the vigorous water action while they are suspended and freely moved about in and by it, and to whatever extent there is any contact of the clothes with the impeller blades it has no substantial effect whatever on the washing action.

This is the teaching of the Snyder patent, and is the operation of plaintiff's and defendants' machines, and it has so been held and found by both trial courts before whom repeated demonstrations were made. It is in this respect that the Snyder invention is completely distinguished in operation from any of the types which preceded it, which depended for their washing action upon rubbing, scrubbing, dragging and squeezing of the clothes.

The defendants quote, on page 14 of their brief, from the opinion of the Second Circuit Court of Appeals in the Brooklyn Edison case to sustain their contention as follows:

> "The evidence shows that the machine made under the patent and the machines of the appellant, as well, **cannot wash by water action alone.** Some scrubbing, pounding, or flexing to deform the threads of the fabric is indispensable to the clothes washing operation. In the machine made under the patent, the circular movement of the water and the clothes does in fact bring the clothes and different portions of them rapidly in contact with the impeller blade which **scrub, beat, and flex** the clothes to conform the threads and loosen the dirt from the interstices of the fabrics."

This statement was copied almost verbatim from de-

fendant's brief in that case, but is entirely inconsistent with the findings of Judge Byers, Judge Otis and the Court of Appeals for the Eighth Circuit.

There is no testimony in the instant cases to support this holding by the Second Circuit Court of Appeals, while there is ample uncontradicted evidence to support the findings of Judge Byers, Judge Otis and the Court of Appeals for the Eighth Circuit.

The testimony of numerous witnesses, qualified by experience, including that of housewives, overwhelmingly shows that the clothes in the Snyder machine **are washed by water action,** that the impeller blades **do not scrub and beat** the clothes, and that clothes can be and are washed in that machine by water action alone.

Walter Bones testified that in the Snyder machine (EH 161):

> "clothes are washed with water currents."

And (GE 90) in these machines the clothes—

> "had a free roll-over and were suspended in the water; they did not contact any moving parts in the machine to become torn."

And (GE 117):

> "the new principle of washing, is the one outstanding quality of the machine that is responsible for our success."

Ray Ryan testified (EH 180) that the clothes are brought out—

> "spotlessly clean from the water action only, the water action supplied by the gyrator that moved forth and back in the bottom of the tub, agitating the water and forcing it through the fabrics or the garments that were in the machine."

And (EH 222):

"If the Maytag is operated according to instructions, it will wash clothes perfectly clean by water action alone, and wash all the clothes all the time while the machine is in action."

Gladys Ryan, a housewife, testified to the same effect (EH 227).

Oscar Beushausen, long experienced in the manufacture of washing machines, and in no way connected with the plaintiff company, testified (EH 273):

"in the Maytag type it is a matter of the force of the water—you are throwing that water against and through the clothes, forcing it through to clean the fabric . . . . and forcing that water through the fabric is what cleans it, without rubbing."

Lucien Yeomans, an experienced engineer, testified without contradiction (EH 314-15):

"The clothes are never brought in substantial contact with the impeller blades, and they are very seldom touched in any way, even lightly, by them. There is no rubbing or scrubbing by the impeller blades of the clothes in the Maytag operation, in the Snyder operation."

And he says (EH 291) that the fabrics are in suspension all the time and—

"While they are carried in that suspension they are acted upon by flexing and, as he (Snyder) says, cracking like a whiplash and distorted and bending in all directions and working the fabric to free the loose particles of soil from the fabric while they are carried in suspension by this action of the directional currents."

Defendants' brief (pp.17-24) in discussing under the heading "The Type of Washing Machine Disclosed in the Patent"—"The Claims in Suit," seeks to create

the impression made in the Court of Appeals in the Brooklyn Edison case, that these claims should be interpreted as though they simply covered the combination of three mechanical elements, (1) a tub, (2) an impeller or agitator mounted on a vertical axis in the tub, and (3) power means by which the impeller or agitator may be oscillated. In doing this they disregarded the fact that each claim calls for **an impeller mounted at the bottom of the tub for operation in a fixed plane** (either by direct language or by the description of the water flows), and **by the tub and impeller** being **"so constructed and positioned" or "arranged,"** in the manner so clearly disclosed in the drawings and the patent specifications, as to create the vigorous flow of water currents which force the water through and around the materials, move them freely about, and suspend them while being washed.

It is only by eliminating from their discussion of these claims these important features of construction and arrangement, to which each of the claims is limited, that they proceed with their discussion, and assert that these claims are met by the Davis and other patents which had an entirely different "construction and arrangement" of parts and operated in an entirely different manner.

Throughout their brief defendants call attention to the fact that Snyder says in his patent that the impeller may be mounted at the top of the tub. We are not concerned with those statements here because each of the claims contains language that calls for an impeller **mounted at the bottom of the tub,** and each calls for the **"construction** and **arrangement"** of the impeller whereby the desired flows and capabilities of the water action accomplish the novel result. In order to ac-

complish this the impeller must be of substantially less diameter than the upwardly projecting portion of the tub, and the impeller blades must be of such height as to impel sufficiently large bodies of water in each direction to secure the result of suspending the clothes and moving them freely about and washing them while thus suspended, and this impeller must be rapidly oscillated to secure that result.

A reference to the drawings makes entirely clear what the patentee meant by this **"construction and arrangement,"** as we have pointed out in our main brief (pp. 55-66). Each of these claims fully satisfies the requirements of the law as to definiteness laid down by the Eighth Circuit Court of Appeals in the General Electric case (p. 223) and by this Court in the *Eibel v. Paper Co.* case, 261 U. S. 45, and other decisions cited under Points V and VI in our main brief (pp. 38-9).

Any construction which has a **"freely movable vertically" rubboard mounted at the top of the tub,** whether it floats upon the water and is subject to the up and down movement incident to its operation, or whether it slides downwardly and compresses the clothes and drags them about and rubs them as in the machines of the Davis patent, is diametrically opposed to the construction and arrangement and operation of the Snyder invention with its impeller **mounted at the bottom** of the tub for operation in a **fixed** plane, and **"constructed and arranged"** in the manner clearly shown in the patent drawings and set forth in the specifications.

Defendants themselves realize this for, instead of using the Davis or any of the structures of the prior art, they admittedly use the same construction and arrangement as is claimed by Snyder in each of their machines, for they concede infringement of claims 26

and 29, and flamboyantly and unrestrainedly advertise, that their machines secure the same results in substantially the same manner as the Snyder invention.

The claims are each limited to the "construction and arrangement," of mechanical parts, supplemented by a description of the action of the water created by them when operated in the manner disclosed. They are not merely functional as defendants contend.

Although defendants take direct issue throughout their brief with the complete statements we have made in our main brief with respect to the Davis and Doughty & Davis patents and the machines made thereunder, and the Jardine British patent, we believe what we have heretofore said makes entirely clear our position with respect to them, especially as our statements are so fully supported by the findings of Judge Otis (18, App. 37; 23, App. 47; 27, App. 50; 19, App. 41), and Judge Byers' opinion which he makes a finding (see Finding 33, App. 11), and by what is said in the opinion of the Eighth Circuit Court of Appeals with respect thereto (100 F. (2d) 218, 221, 224).

Argument.

As we have anticipated most of the points covered in defendants' brief in our main brief, we shall limit our reply to their argument to pointing out:—

(1) wherein the defendants' representations with respect to the Snyder patent and the interpretation which should be given to its claims and with respect to the prior art, are clearly erroneous, and that these representations made in defendant's brief filed in the Court of Appeals for the Second Circuit in the Brooklyn Edison case, led that court into its erroneous opinion here so largely relied upon by the defendants, both with respect to this patent and the prior art.

(2) that plaintiff's disclaimer of claims 38 and 1 of the Snyder patent, after the former had been held invalid by the Court of Appeals for the Second Circuit, did not require it to disclaim claim 39 concerning which no adjudication had been had, especially where it is continuing to vindicate its position with respect to claims 23 and 26, which the Court of Appeals for the Second Circuit had also held invalid, and where there have been concurrent findings of the trial court and the Court of Appeals for the Eighth Circuit that claim 39 is different from either of the claims disclaimed. (See our main brief under Point V, pp. 108-11.)

(3) That the Second Circuit Court of Appeals, unlike the Eighth Circuit, ignored the findings of fact of the trial court and apparently without consideration of them adopted the erroneous statements made in defendants' brief and here repeated. In doing so the Second Circuit Court of Appeals ignored and the Eighth Circuit Court of Appeals followed the thoroughly established rule that the finding of the trial court must be treated as unassailable so far as there is any testimony consistent with the finding. (*Davis* v. *Schwartz,* 155 U. S. 631, 636, and other cases, and the rules of civil procedure, cited in our main brief, Point I, p. 35.)

I.

Defendants' argument is predicated on much the same erroneous statements concerning the construction and operation of the Snyder patent, and the machine claims in controversy and those of the prior art, that it made, for the first time, in its brief filed in the Court of Appeals for the Second Circuit in the Brooklyn Edison case. That court's adoption of these statements and its complete disregard of the testimony and

findings of the trial court must have led it to make the erroneous statements on which its opinion in that case was predicated and to the result there arrived at and repeated when it adopted that opinion in cases Nos. 76 and 77, as we fully point out under III hereafter. These statements are directly contrary to the findings of the trial courts and the Court of Appeals for the Eighth Circuit, and the clear preponderance of the evidence. We have already pointed this out in our main brief (pp. 14-19, 103-107).

In our main brief (pp. 45-50) we have specifically called the Court's attention to portions of the Snyder patent which depict with accuracy his invention, and (pp. 55-65) have called attention to the specific limitations of each of the claims in suit, each of which is present in Snyder's and each of defendants' machines, and are of vital importance to secure the identical operation and results admittedly present in each of them. In holding these claims invalid, the Second Circuit Court of Appeals disregarded the limitations of each of these claims, and made many erroneous statements concerning the Snyder patent and the machines made under it by the plaintiff.

II.

Defendants' Contention that the Snyder Patent Is Wholly Invalid By Reason of Plaintiff's Neglect Either to Disclaim Claim 39 or Litigate Its Validity Is Without Support In Fact or Law.

Defendants persist in a contention admittedly ignored by the Second Circuit Court of Appeals in Nos. 76 and 77 and overruled by Judge Otis and the Eighth Circuit Court of Appeals in No. 661, obviously it seems, to divert the attention of

the Court from the one important issue of this case, namely, the patentable novelty of the invention of the Snyder patent. They assert as the first point of their argument that the patent is unenforceable because plaintiff failed, following the decision in the **Brooklyn Edison** case in which method claim 38 was held invalid, either to disclaim claim 39 or assert it in litigation. Notwithstanding claim 39 was not sued upon in the **Brooklyn Edison** case and, indeed, has never been asserted, and the question of its validity has never been adjudicated, in any litigation, and notwithstanding it is "essentially different from claim 38" as pointed out in our main brief (p. 109), and found by Judge Otis (Finding 28, App. 52) and adjudged by the Eighth Circuit Court of Appeals in No. 661 (100 F. (2d) 218, 224-5) defendants, by an involved process of reasoning, argue that claim 39 is a claim for the same method as that covered by claim 38 and is invalid because claim 38 was held to be so in the **Brooklyn Edison** case. And so they contend that the presence of claim 39 in the Snyder patent constitutes "a lurking threat of the same monopoly" which it was plaintiff's duty to eliminate by disclaimer or vindicate by litigation.

In our main brief (pp. 108-111) we showed that under the decisions of this court in the *Leeds & Catlin Co.* case, 213 U. S. 301, in the *Ensten* case, 282 U. S. 445, and in the *Triplett* case, 297 U. S. 638, each claim of a patent is deemed to be for a separate invention, and the filing of a disclaimer of a particular claim is not required until after that claim shall have been determined to be invalid by an adjudication which shall have become final. We also there pointed out that it has generally been held that the question of whether or not to file a disclaimer of a given claim in any case

is a question of policy and that the filing of a disclaimer is not an admission of invalidity of the claim disclaimed.

Defendants, however, contend for a higher ethic on the part of the patent owner. Despite the presumption of validity attending the grant of a patent, and the determination by the Patent Office of patentable difference between the several claims of a patent incident to the grant, and notwithstanding the interpretation of a patent claim involves a question of law for determination by the Court* and, as they admit in their brief (p. 29), an issue of fact is presented evoking an inquiry as to the scope and relation of the claims involved, defendants would impose on a patent owner a responsibility and duty, not indicated in any statute or any decision of this Court or of any other court, of determining for himself and at his hazard, without day in court, promptly following an adjudication of invalidity of one claim, the precise bearing of that decision upon every other claim of his patent and of electing either to disclaim each such claim or immediately assert it in litigation. This, even though there was no one against whom such claim could be asserted. Manifestly the contention is beyond all reason.

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* *Winans* v. *Denmead*, 56 U. S. 330, 338.

"The duty of interpreting letters-patent has been committed to the courts. A patent is a legal instrument, to be construed, like other legal instruments, according to its tenor. Whether its claims are valid or invalid, whether or not they embrace a given invention, and what may be the actual nature of the invention which they do embrace, are questions of law for the court, to be decided upon an inspection of the instrument itself." 2 Robinson on Patents, p. 481, sec. 732.

Ever since the *Paper Bag Patent Case,* 210 U. S. 405, it has been an accepted principle of the law of patents, subject to statutory limitations, that the rights of a patentee are not dependent upon use or assertion of the patent in whole or in part. *Crown Co.* v. *Nye Tool Works,* 261 U. S. 24, 34. And there is nothing in the opinions of this Court in the *Ensten* case and the *Triplett* case to indicate the contrary. The salutary rule laid down in the *Ensten* case is satisfied when, as in the instant cases, the patent owner, met with an adverse decision as to validity, has disclaimed or continued in an attempt to vindicate the **particular** claims held invalid.

Defendants' assertion that claim 39 is invalid because it is for the same method as claim 38, when (as pointed out in our main brief, p. 109) it is apparent upon inspection that the two claims are essentially different, is not entitled to serious consideration. Nor is it aided by reference to Finding 31 of Judge Byers in the **Brooklyn Edison** case. It is pure sophistry to say that even if plaintiff had admitted (which we deny) that claim 38 and claim 1 comprehend substantially the same method, claim 39 must be held to be substantially the same as claim 38, when it is plainly different in important respects.

A distinguishing feature of claim 39 **is to freely move the clothes about and cleanse them while thus moving.** This feature is entirely lacking in claim 38. By keeping clearly in mind this fundamental difference between the two methods, it readily becomes apparent, we submit, that defendants' contention as to its disclaimer defense has no application here under the facts. Judge Otis properly found (Finding 28, App. 52):

"Claim 39 is for a separate invention from

claim 38 in that claim 39 includes as part of its operation the step of causing the fabrics to be 'freely moved about,' whereas that step is not specified in claim 38. This feature of causing the fabrics to be freely moved about in order to evenly distribute them in untangled condition and rapidly roll them over is one of the distinguishing features of the claims here asserted."

The propriety of separately claiming different forms or phases of a mechanical invention, as well as the various steps and sub-combinations of steps of a method, has long been well recognized. *Steinmetz* v. *Allen,* 192 U. S. 543; *Symington Co.* v. *National Casting Co.,* 250 U. S. 383, 385; *Triplett* v. *Lowell,* 297 U. S. 638, 645; 2 Robinson on Patents, p. 145.

This was done in the case of the Snyder patent. In addition to claiming in a number of different claims, various forms of apparatus, the inventor elected to claim his new method of washing disclosed in his patent. In claim 1 he claimed broadly a method of cleansing fabrics "without substantial contact with rubbing surfaces," in which "violently flowing currents" of washing fluid are created. These are described as "moving away from and back to the plane of the source of agitation, and also **around the tub**" "**in a plane approximately parallel with the plane of agitation**" in reverse directions "so as to bodily and forcibly cause the fabrics in the tub to travel in substantially the same paths as the fluid."

In claim 38 he claimed broadly a method in somewhat different form, describing the operation as "vigorously and rapidly impelling the washing fluid in one and then in an opposite **outward circulatory direction** away from the plane of the source of impulsion and through the fabrics and **circumferentially** along the

interior of the container in rapid succession, and causing these violently opposed currents of fluid to meet and flow inwardly and toward the central portion of the container, and toward the source of impulsion **thereby substantially suspending** the fabrics in the fluid and cleansing them while thus suspended."

It will be observed that in both claim 1 and claim 38 the movement or flow of the washing fluid is described as "around the tub," "circulatory," or "circumferentially," "away from and back to the plane of the source of agitation" or "impulsion," "in a plane approximately parallel with the plane of agitation." Nothing is said in either claim 1 or claim 38 of vertical movement or flow of the washing fluid, or "free" movement of the fabrics. Claim 39 is of more limited scope.

Claim 39 requires not only that the washing fluid be forced "toward the fabrics and away from the plane of the source of agitation" but "**vertically** along the interior or surface of the container" and "through **and around** the fabrics," and that the "violently moving opposed currents of liquid" be caused "to meet and flow inwardly **and vertically** toward the source of agitation **whereby the fabrics are caused to be freely moved about by the action of the fluid and cleansed while thus moved.**" Claim 39 thus clearly describes a method different from that of claim 1 or claim 38 in two important respects, namely, there is required a definite vertical movement or flow of the fluid currents and that the fabrics be "freely moved about by the action of the fluid and cleansed while thus moved." Obviously, the presence of these limitations in claim 39 makes it a different and more limited claim.

In these circumstances plaintiff's position with respect to claim 39 is fully justified. It would, indeed,

violate the spirit and purpose of the patent laws* to strike down the Snyder patent upon any such argument as that advanced by defendants.

Plaintiff's position with respect to claim 39 has been consistent throughout. Before the trial court in Nos. 76 and 77, where defendants first made their contention, before the Second Circuit Court of Appeals in those cases, before the trial court in No. 661 and before the Eighth Circuit Court of Appeals, plaintiff has consistently opposed the contention on the grounds here relied upon, thus at all times making clear its position with respect to claim 39 and its relation to claim 38. And plaintiff is fortified in this position by the uniform ignoring or rejection of defendants' contention by every court to which it has been presented, including both trial courts and both Circuit Courts of Appeals in the instant cases. On this record, and especially the concurrent holdings of the trial court and the Eighth Circuit Court of Appeals in No. 661 that claim 39 is substantially different from claim 38, can the plaintiff fairly be charged with the responsibility of reaching a different conclusion? This question was answered by this Court in the *Ensten* case, where it said, adopting the language of Robinson on Patents, (282 U. S. 445, 453):

> "In cases where the excess is not apparent at once upon the inspection of the patent by the patentee, the allowance of his claim by the patent office raises such a presumption in its favor that

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* "Patents for inventions are not to be treated as mere monopolies, and, therefore odious in the eyes of the law; but they are to receive a liberal construction, and under the fair application of the rule, *ut res magis valeat quam pereat,* are, if practicable, to be so interpreted as to uphold and not to destroy the right of the inventor." Turrill v. Railroad Company, 1 Wall. 491, 510.

he may rely on its validity until a court of competent jurisdiction decides that it is broader than his real invention."

The public interest is not only satisfied but well served by adherence to the rule of the *Ensten* case. To depart from it as defendants urge would result in great uncertainty as to the necessity of filing a disclaimer in any case.

Even if the question of the validity of claim 39 were before this court and should be determined adversely to plaintiff in these cases under the rule of the *Ensten* case, plaintiff would under the statutes have a reasonable time following the entry of a final decree to that effect in which to file a disclaimer of that claim.

Defendants' contention that the Snyder patent is unenforceable for failure to file a disclaimer of claim 39 or assert it in this litigation is without merit.

III.

The Opposed Opinions of the Circuit Courts of Appeals.

Defendants' brief, instead of questioning any finding of the trial courts, relies upon the opinion of the Second Circuit Court of Appeals which is quoted *in extenso,* and that of the Eighth Circuit is made the subject of a strenuous attack in which it is repeatedly charged that that Court was wrongly led to its conclusions by erroneous suggestions and representations in plaintiff's briefs and arguments (Defs.' Brief, Point IV, pp. 71-82).

The fact is that the conclusions of the Eighth Circuit Court of Appeals are based on the evidence, findings of fact of the trial court, and established principles of law, and these are discussed in the opinion of Judge

Gardner. In marked contrast the opinion of the Second Circuit Court of Appeals consists in large part of statements either copied or adopted with slight change from defendants' brief; no reference is made to any finding of the trial court, though in some important particulars the Court of Appeals held directly contrary to those findings. No reasons whatever are given for disregarding the careful findings and opinion of Judge Byers.

A brief comparison of the treatment of the most important issues by the two Courts of Appeal will, it is believed, illuminate those issues and show the preponderance of the views of the latter.

A. The Patented Invention In Suit.

The statements of the Circuit Court of Appeals for the Second Circuit in the *Brooklyn Edison* case to the effect that the Snyder machine operates **"partly by rubbing"** now quoted and urged upon this Court by defendants were adopted from the brief of defendants' counsel in that case (pp. 9, 11). In that brief Judge Byers' findings as to the nature of the patented invention and the evidence on which those findings were based were ignored. In adopting the brief the Court likewise ignored the findings. They were not even mentioned. Those **findings** were that the water action "so functioned as to distort and manipulate the fabrics and thereby cause deformation of the thread," and "When Snyder said that he caused the several threads to be acted upon as a result of the interplay of the interposed currents of water upon the fabrics which were set in motion by the impeller, as he described, he made a statement which has not been disproved by the evidence in this case." (Finding No. 10, App. 5);

That "As the result of observations of numerous demonstrations in the court room with washing machines" "embodying the Snyder invention," "this Court finds" that the water action "so functions as to distort and manipulate the fabrics and thereby to cause thread deformation"; "The defendant has failed to prove that it is impossible to wash fabrics in the Maytag or other machines of the same type according to the teachings of the patent." (Finding No. 20, App. 8);

That "The numerous demonstrations of plaintiff's and defendant's Easy machine in the court room were carefully observed by the Court for long periods of time." As a result of numerous demonstrations carefully observed by the Court, some of them conducted in illuminated glass tubs, "The course of flow described in the patent takes place in all these machines; There was a constant turning of fabrics called roll-over which was not impeded by the temporary engagement of the materials with the impeller; There was a flexing and doubling back of the fabrics as they were driven in and around the tub by the violently flowing opposed currents of liquid created by the impeller; There was no perceptible rubbing of the fabrics against the smooth interior of the tub as distinguished from movement along that smooth interior." (Finding No. 21, App. 8-9; see also Findings Nos. 15, 18, and Judge Byers' Opinion, 11 Fed. Supp. 743).

These findings had ample support in the evidence, a circumstance into which the Second Circuit Court of Appeals did not inquire.

The testimony of numerous witnesses in the instant records, including that of housewives, overwhelmingly refutes the above erroneous statements of the Circuit Court of Appeals of the Second Circuit and estab-

lished, as Judge Byers, Judge Otis and the Eighth Circuit Court of Appeals found, that the clothes in the Snyder machine **are** washed by water action, that the impeller blades do **not** scrub and beat the clothes, and refutes the statement that the clothes in it are washed **"partly by rubbing."** (Gladys Ryan, EH 227; Ray Ryan, EH 180, 197, 212, 222; Beushausen, EH 273; Bones, EH 160-164; GE 90, 117; Yeomans, EH 314-5, 291).

On this same subject, namely, the nature of the operation of the Snyder machine, **Judge Otis**, after careful observation of extended demonstrations of the plaintiff's machines, and defendants' admittedly infringing machines, found as a result of his observations, "that the clothes being washed were driven about in the tub and substantially suspended, as depicted in the Snyder specification and claims here in suit, by the violent water currents created by the impeller as it was rapidly oscillated back and forth at the bottom of the tub," and

"That the machine of the Snyder patent, the Maytag machines made under it, and defendant's machines, are intended to and do operate in substantially the same way, is shown by the demonstrations of plaintiff's machines before the Court, by the statements of plaintiff's witnesses, by the General Electric circulars (Pl. Exs. 16, 16A, 16B), and by the testimony of defendant's expert witness, Taggart." (Finding No. 3, App. 31, 32; see also Finding No. 5, App. 33, 34; Finding No. 12, App. 35).

The Circuit Court of Appeals of the Eighth Circuit, unlike the Second Circuit Court, recognized that the trial court's findings on this disputed issue of fact were not to be disregarded, or overruled if there was substantial evidence to support them. It said—

"The lower court, convinced by oral testimony and demonstrations before it, held that the machine made under the Snyder patent washes by water action."

"Defendant contends that the findings of the lower court on these matters are not sustained by substantial evidence."

"We think the findings of the lower court are sustained by abundant evidence." (100 F. (2d) 221, 222, 223). (GE 1891, 1892, 1894.)

This contrast of the treatment of the evidence and the trial court's findings on that evidence by the two Circuit Courts of Appeal speaks for itself. It demonstrates that instead of being led to its alleged erroneous conclusions by the arguments of plaintiff's counsel, as defendants would have this Court believe, the **Eighth** Circuit Court of Appeals adhered to the long established rule of this Court as to the weight of findings made by a trial court on a disputed question of fact and sustained the plaintiff's contentions, solely because after careful consideration and discussion of the evidence it found that those findings had ample support in the evidence. It is equally clear that the **Second** Circuit Court of Appeals ignored this rule, and without reference to the findings of Judge Byers or the evidence on which they were based, adopted the convenient course suggested by the defendants without deviation therefrom. There is no indication whatever in the opinion of that Court that it considered the trial court's findings or the evidence, (*supra*, pp. 6-14) that the machines of the Snyder patent and the defendants' machines operated as described in the Snyder patent, namely, by water action. It would seem that if the Court had considered the findings to the contrary ~~been so convinced~~ it would have so stated and advanced its reason for ~~that~~ conclusion.

The same contrast exists between the methods of ap-

proach of the two Circuit Courts of Appeals to the other disputed questions of fact in the case, and this will be briefly shown.

B. The Davis Patent.

The Second Circuit Court of Appeals stated that in the Davis machines the movement of the water "does in turn impart a similar movement to the fabric and thus anticipated the method of washing described" in the patent in suit (86 F. (2d) 628). All of the discussion in the opinion was taken almost verbatim from the defendants' brief.

These statements were contrary to the findings of Judge Byers, beginning with his Finding No. 10 above referred to, as to the nature of the Snyder invention. The Davis patent and machine were before him but, nevertheless, he found that "The Snyder machine was a new step and an advance over previous machines in that the water action became the major factor in the operation and so functioned as to distort and manipulate the fabrics and thereby cause deformation of the thread." (Finding No. 10, App. 5.)

In his opinion he said as to the Davis patent "Thread deformation through water action is not even suggested" (11 F. Supp. 743, 751). No reference to his findings or opinion as respects Davis was made by the Court of Appeals; nor was there any reference to the evidence concerning that patent.

Judge Otis' findings with respect to the Davis patent and machine were to the same effect as those of Judge Byers but more extensive and based on even a greater weight of evidence because the Davis patent and machine received more attention in the General Electric case than in the Brooklyn Edison case.

(Finding No. 18, App. 37.) He there refers to the testimony and the demonstrations of the Davis machines made before him and finds therefrom that "this machine was **substantially identical**" "with that of the **old rubboard** type of machine on the market previous to 1922 and long since abandoned"; that in the machines of the Davis patent "the clothes are compressed and rubbed as a mass between the slidably mounted rubboard and the bottom of the tub, and that the clothes are washed in it by the rubbing action of the rubboard and the rubbing of the mass against the corrugated interior of the tub, and **in a manner radically different** from that described, disclosed and claimed in the Snyder patent."

He likewise found that "The **construction** of the Davis machine with its rubboard **slidably** mounted in the cover of the machine of substantially the same diameter as the interior of the tub, with its low rubbing cleats, and its **operation** of **compressing** and **rubbing the mass** of **clothes between the rubboard and the corrugated interior** of **the tub with little circulation of water,** is **radically different** from the **construction** and **operation** of the machine of the **Snyder** patent drawings, description and claims in suit." (Finding No. 18, App. 40, 41.)

Furthermore, Judge Otis found—

> "That the machine shown in the Davis patent will not operate or wash clothes in a manner described in its specification, is further shown by the testimony of defendant's fact witnesses, by plaintiff's demonstrations of these machines before the Court, and by the testimony of plaintiff's and defendant's experts. (See Taggart, R. 446; Kenerson, 760-773." (App. 40.)

The statement of the evidence on this subject, with

reference to the testimony, which will be found at pages 69-82 of our main brief on this appeal, shows that there was ample support in the evidence for Judge Otis' findings with respect to the Davis patent and the 1900 Company's machines made under it.

The Circuit Court of Appeals of the **Eighth** Circuit discussed this subject at length, referred to Judge Otis' findings concerning the Davis patent and explained why they agreed with his conclusions in that regard. Its discussion of the subject (100 F. (2d) 218, 200-223, GE 1892-4) is respectfully commended to the Court's attention as a complete disposition of the defendants' contention that Davis anticipated Snyder.

It conclusively appears, therefore, that in respect to the Davis patent the Court of Appeals of the Eighth Circuit made a careful investigation to ascertain whether there was substantial evidence in the record to support the finding of the trial court that the machine of this patent differed entirely in structure and mode of operation from Snyder, whereas the Second Circuit Court of Appeals contented itself with adopting the defendants' argument about that patent without reference to the evidence or the findings of the trial court.

C. The Doughty & Davis Patent and the 1900 Company's Form 4 Machine Made Under It.

The Circuit Court of Appeals of the Second Circuit in the Brooklyn Edison case held that this patent and the Form 4 machine anticipated the Snyder patent (86 F. (2d) 628). The opinion discussed only the alleged similarity of the machine and patent. In that respect it made no reference to the findings of Judge Byers and completely disregarded his opinion that neither the patent nor the machine anticipated Snyder (11 F.

Supp. 751-2), as well as his reference to the testimony of the defendants' expert, who said that the washing effect of the Doughty & Davis patent is produced by squeezing and dragging and its rubbing effect is greater than in the Maytag machine.

But the striking feature of the Second Circuit Court of Appeals' holding as to the Doughty & Davis patent and the Form 4 machine,* is that it "**anticipated** the (Snyder) patent." No reference whatever was made to the contest over priority of date as between Snyder and Doughty & Davis. The Doughty & Davis patent was applied for two months before Snyder's application was filed, and the patent issued before Snyder's patent issued. Plaintiff presented several witnesses before Judge Byers who testified that Snyder's invention had been made long **prior** to February, 1921, the **earliest** date which could be claimed for Doughty & Davis (see plaintiff's main brief, pp. 83-91). On this testimony Judge Byers found—

> "The testimony taken in open court shows that Snyder disclosed his invention to Frederick F.

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* Defendants say in footnote, p. 45 of their brief, "Development of this Form 4 machine began in September 1920." There is not the slightest evidence to show any development work on this machine at that date, or indeed any prior to February 8, 1921. There was a Behan exhibit dated 2/9/20 (GE D. E. 7, GE 1707; 366-7). Behan testified concerning this sketch (GE 366): "We never made anything like it. . . . The idea, I think, embodied the principle of washing the clothes with the agitator or scrubboard or whatever you call it, coupled with the thought that as it oscillated back and forth the agitator took a peculiar motion squeezing the clothes and releasing them on one side and squeezing them on the other, as it traveled around back and forth."

> Mason on January 21, 1921, and **that Snyder's reduction to practice preceded that date by several months.**" (Finding No. 26, App. 10.)

The Court of Appeals of the Second Circuit made no reference whatever to this finding or to the evidence on the subject, but in complete disregard of both finding and evidence held that Doughty & Davis were prior to Snyder. It is difficult to explain this surprising action except on the hypothesis that the question of date was overlooked.

In No. 661, the testimony concerning the date of Snyder's invention was somewhat amplified and some additional documentary evidence was introduced. On this evidence and notwithstanding the holding of the Second Circuit Court of Appeals on the subject, Judge Otis found that the testimony taken in open court established that Snyder had reduced his invention to practice in May of 1920 (Finding No. 27, App. 50, 51) and "more than eight months before the earliest date claimed by defendant for the disclosure or use of the 1900 Company's Form 4 machine made under the Doughty and Davis patent. The Doughty and Davis machines can not be used as an anticipation of Snyder."

The Court of Appeals of the Eighth Circuit pointed out that the finding of Snyder's priority in date was—

> "based upon testimony of witnesses appearing in open court. An examination of this testimony convinces us that it is substantial."

It then applied the rule of *Adamson* v. *Gilliland,* 242 U. S. 350 (100 F. (2d) 223, GE 1894-5).

Judge Otis held on the evidence before him that the Snyder machine is "clearly distinguished from the structure and disclosed operation of the Doughty and Davis machine." (Finding No. 23, App. 50.) The

Court of Appeals also clearly distinguishes this machine from Snyder's invention. (GE 1896, 100 F. (2d) 218, 223.)

D. The Jardine Patent.

The facts concerning this patent are set forth in plaintiff's main brief (pp. 96-101), and it is there pointed out that the statements of the Circuit Court of Appeals of the Second Circuit with respect to the structure of that British patent were entirely mistaken, and contrary to Judge Byers' description of the Jardine mechanism in his opinion. The Second Circuit Court of Appeals preferred to closely follow the defendants' brief, and in doing so fell into error. As stated in our main brief (p. 99), Judge Otis' attention was called to this error and he found directly to the contrary.

The Circuit Court of Appeals of the Eighth Circuit pointed out that Jardine's was a "dolly" machine, and that the patent did not "suggest a solution of the problem solved by Snyder," or a suggestion of washing clothes by water action instead of rubbing, pounding, squeezing, compressing and dragging them, as was done by the dolly type of machines of 1891, the date of the Jardine patent. It agreed with Judge Otis' conclusion about this patent and a comparison of its statements about the patent with those of the Second Circuit Court of Appeals shows that it was right.

The opinions of the two Circuit Courts of Appeal are submitted without further comment.

IV.

The Development of 1900 Company's Present Machines Made Under License of Snyder Patent.

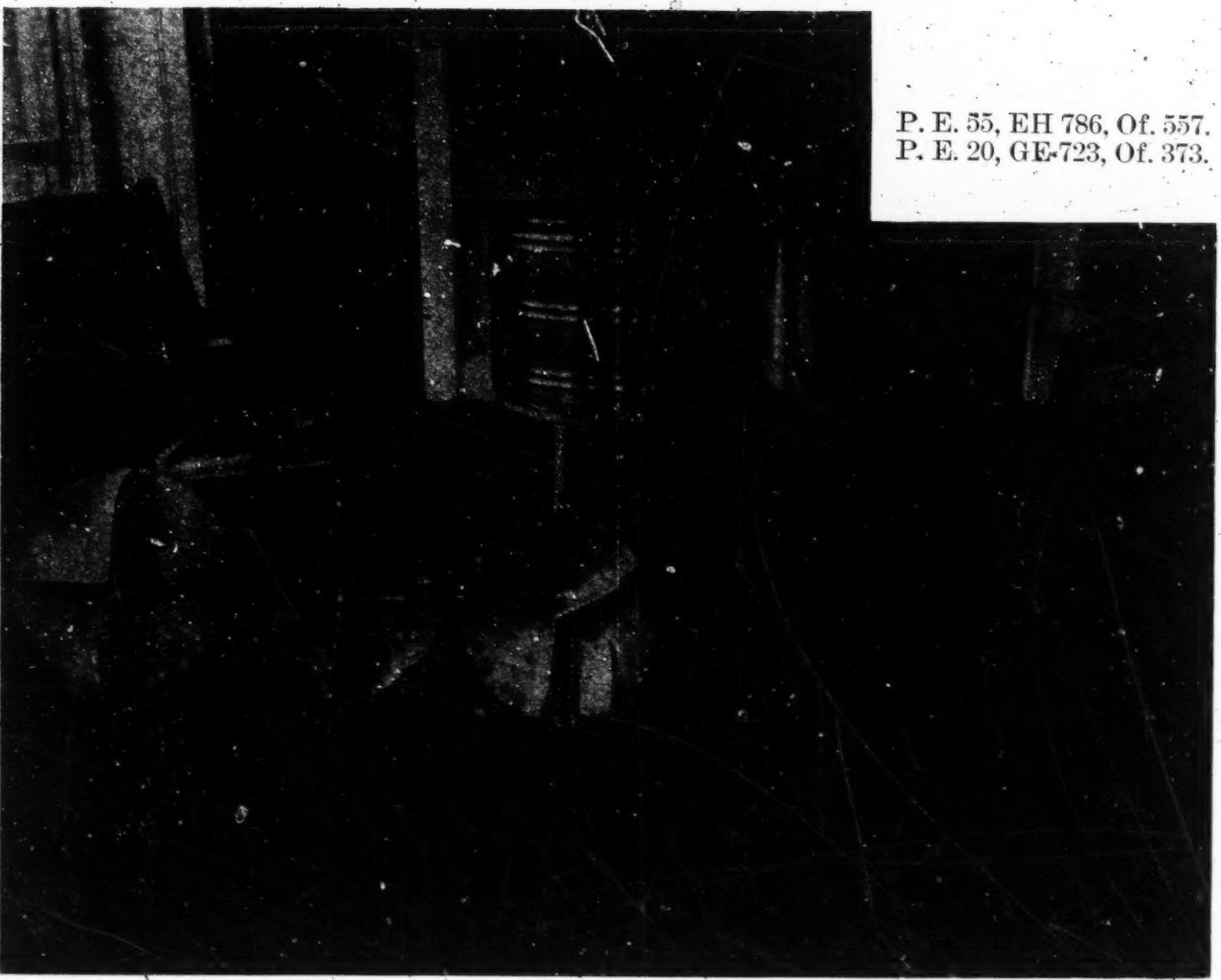
Defendants' counsel tries to make it appear (Brief 43-53) that the 1900 machine made under license of the Snyder patent (D. E. 38, GE 1803, D. E. 12, EH 1343) was simply an outgrowth of the Davis and the Doughty & Davis machines, and that it corresponds to them in construction and operation. The testimony of defendant's own witnesses shows that after the Snyder gyrator machine came upon the market the 1900 Company secured one of these machines and made it available to its experimental department. With this machine before it, the 1900 Company carried on a large number of experiments to develop a machine which would compete with the Snyder gyrator machine. Some of these attempts are shown in Plaintiff's Exhibit 20 (GE 723) reproduced here.

The first one of these machines made and sold by the 1900 Company was the single blade construction shown at the right in the photograph, and it was used for some time and then substantially superseded by a three blade construction (D. E. 38, GE 1803, D. E. 12, EH 1343) substantially identical with the defendants' machines in the present cases, and concerning which Mr. Behan testified (EH 375)—

> "Our principal production at the present time is the triple vane agitator with the high center post with vanes equi-distantly spaced."

The testimony shows (Behan, EH 359) that the 1900 Company was—

> "having a lot of complaints to the mechanical imperfections and difficulties of the Form 1 [Davis] machine described, Exhibit 2, and from our sales.



P. E. 55, EH 786, Of. 557.
P. E. 20, GE-723, Of. 373.

department's viewpoint it seemed to have outlived its usefulness"

with the result that it abandoned this machine and set Doughty to work with Davis to see if they could not get some machine which would eliminate the difficulties with the old Davis. As a result the Form 4 machine was developed and after selling some 700 of them (EH 367, 373) they were abandoned.

As to whether the changed construction justified the hopes that the Form 4 machine was an improvement over the Form 1, Mr. Behan testified that they—

"did not have time to determine [this] before it was taken out of production." (EH 365.)

During these attempted sales of 1900 Company Form 4 machines, in March, 1922, the Maytag gyrator machine came upon the market, and the 1900 Company had a Maytag machine in their factory in 1922. "The Maytag machine which I referred to is the one disclosed in the patent in suit." (EH 371.) With this machine in its factory, the 1900 Company carried out exhaustive experimentation on the type of machine before adopting the single blade agitator shown in the Davis patent No. 1,748,442 (EH 370).

If as defendants' counsel contends the present 1900 machines made under license of the Snyder patent was simply a normal development of their old type machines, it is hard indeed to see why it was necessary for the 1900 Company to make such exhaustive experiments with the Maytag machine in order to arrive at the machine which it is selling under license of the Snyder patent.*

* After the issuance of the Snyder patent, the 1900 Company secured a license to operate under that patent in connection with the manufacture and sale of this new type of machine and has been manufacturing under license of that

V.

The Miller Machines and Patent.

In their brief (p. 53), defendants attempt to show that the Miller machines were of the agitator or gyrator type, but their own testimony shows conclusively that the construction and operation of these machines is radically different from that of the Snyder patent. In each of the machines offered by the defendants there is a tub. In one of them the entire interior of the tub sides and bottom is corrugated, and in the other the bottom is corrugated. There is a shaft at the center of the tub in each of these machines. **Slidably mounted** on this shaft is a dolly rubboard intended to grasp the clothes and drag them as a mass through the water against the corrugated interior of the tub. In order to put clothes in the tub, the dolly rubboard had to be lifted out of the tub, and after clothes were placed in the tub, the dolly rubboard was placed on the shaft and slid down and penetrated the clothes.

A machine operating in the same manner as the ones offered in evidence by defendants is shown in the Miller Manufacturing Company's circular:

> "The 'Home Model' Type J, Electric Washing Machine gets all the dirt out of the clothes in a scientific way.
>
> "Instead of being worked and torn by a 'dolly,' the clothes are **gently carried by the agitator over a rubbing board.** The agitator automatically ad-

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patent since. While it is true that The Maytag Company also has a license (EH 386) to make the single blade construction shown in the photograph attached, there is not the slightest justification for the statement contained in defendants' brief (p. 45) that the 1900 Company is now authorized by an exchange of licenses to operate under the Snyder patent in suit.

justs itself to the amount of clothes in the machine." (EH 792, P. E. 58.)

Defendants' witness John N. Lint, an old employe Mr. Miller, testified that the statements in this cirlar were correct (GE 397, X-Q. 97), and so did harles F. Jenkins, General Manager of the Miller anufacturing Company from 1916 to 1919, who prered the circular (GE 410, 411, X-Q. 43).

Mr. Miller himself testified that this circular learly shows and describes" that machine (GE 412).

The Miller patent of 1903 (GE 727) shows a maine which operates in the same way as the exhibit achines offered in evidence by defendants. In that tent it is stated:

> "The journal portion of the latter (agitator) is, however, somewhat longer than the bearing in order that it shall be capable of a certain amount of vertical or up-and-down adjustment while in operation in order to accommodate itself easily to the quantity of the articles being washed" (Patent, p. 1, line 59).

eaking of the ribs on the rubboard, the patentee says ne 73):

> "These ribs have their sides inclined toward each other from their bases to their bottoms, so that the intervals between them will become narrower toward the disk-bottom, thereby facilitating the rubbing action of the ribs."

d again (line 100):

> "The rubbing is effected by the action of the side and bottom ribs of the agitator in conjunction with the side and bottom ribs of the tub, and this rubbing, in connection with the rush of the water as the agitator is turned within the tub and the squeezing action effected by the up-and-down movement of the agitator, is designed to cleanse the articles in the tub in a satisfactory manner."

In the footnote on page 54 of defendants' brief, it is asserted that Judge Otis' finding that "The defendants' witnesses testified that the operation of these machines is disclosed in the Miller patent No. 738,560 of 1903" was error (Finding No. 20, App. 44). The fact is that the witnesses did so testify (Lint, GE 398, X-Q. 111; Jenkins, GE 411, 412, X-Qs. 48, 49).

When Mr. Miller's attention was called to his patent No. 738,560, he stated that it disclosed a machine which had ribs around the inside and across the bottom of the tub and ribs on the under face of the agitator (GE 417), and that in washing clothes the weight of the agitator would press on the clothes in the tub, and as it was operated it would squeeze the clothes between it and the bottom of the tub and drag the clothes back and forth to clean them as described in his patent. Then in referring to the machines, Exhibits 21 and 22, upon which defendants rely, he also stated that in these machines the agitator was moved up and down on the shaft that guides it, and that its ribs (GE 417) pressed down on the clothes and would swish and carry them back and forth in the tub, and that they were put there to move the clothes as (GE 418)

> "You have to get some action there or you can't wash."

The testimony of Messrs. Lint and Jenkins was to the same effect, and all of the witnesses produced by the defendants to prove the Miller machines agree that the weight of the agitator was on the clothes and the agitator penetrated the mass of clothes, and, as it was oscillated, carried and "swished" that mass of clothes back and forth in the tub (GE 402, 412).

Notwithstanding the attempt of the defendants to create a different impression, there can be no doubt that in the Miller machine the sliding, cleated agitator

or rubboard was designed to and did grasp the clothes in operation and drag them around in a mass through the water in the same manner that the old rub-board type washing machine carried them around, and that in addition there was some rubbing of the clothes in a mass by the agitator itself.

VI.

Other Art Referred To In Defendants' Brief.

It is apparent that the defendants do not feel safe in relying upon their contention of invalidity of the Snyder claims in suit on the devices of Davis, Doughty & Davis and Jardine, for between pages 56 and 57 of their brief they insert a chart which they say illustrates a number of early patented "agitator" or "gyrator" type machines, and as to which they contended in their brief in the Eighth Circuit Court of Appeals that even if the claims of the Snyder patent were not anticipated by the machine disclosed in the Davis patent, made by the 1900 Company, and the Miller machines, they should be held invalid for lack of invention over the machines illustrated in this chart.

In their attempt to anticipate the Snyder claims by these structures, instead of fairly interpreting the Snyder claims as we have pointed out in our main brief (pp. 55-66) they say that each of these structures has as the "essential elements (1) a tub, (2) an impeller, either bottom-positioned with upwardly projecting blades or inverted overhead with downwardly projecting blades, and (3) means for actuating the impeller."

The statements made in defendants' brief (pp. 55-60) with respect to these machines are vitally misleading.—

1. Because there is no testimony in the record to show that any of these machines have been designated as of the "agitator" or "gyrator" type. Some of the patents from which they were taken, however, do refer to the dolly or rubboard indiscriminately as dolly, dasher, or agitator,—all meaning the same thing.

2. Most of these either show large rubbing cleats extending vertically of the interior of the tub (Ferguson, GE 1083, EH 857; King, GE 1627; Hanna, GE 1063, EH 942; Covel, EH 862; Runkle, GE 1069, EH 872; Jardine, GE 1047, EH 937) or corrugations on the interior of the tub (Henin, GE 1073; EH 952, and Miller, GE 727; EH 789) for engaging the clothes and rubbing them as they are dragged back and forth by the dollies in the tubs.

3. There is no suggestion in any of the patents from which the machines are said to be taken that the clothes are washed by vigorous agitation of the water by an agitator, or that they are washed while suspended by the action of the water as called for by Snyder. They aptly show the struggle of various inventors to minimize the wear and tear on the clothes while they are being dragged about on the interior of the tub and rubbed and scrubbed between their dollies and the large vertical projections and corrugations on the interior of the tub. Most of them are of the hand operated type, and were but a mechanical substitute for the scrubboard used by the housewife in hand washing. Instead of being differentiated from the old dolly and rubboard types, as defendants attempt to lead this Court to believe, they are of these types and each of them washes clothes in the same way.

Defendant in the General Electric case produced an alleged replica of one of them, the Morse patent, but defendant's expert when requested on cross-examina-

tion to operate it, refused to do so (GE 222). The Court said he would operate it "even three minutes" with the statement that "A Missouri farmer ought to be able to run a washing machine" (GE 222-3). After witnessing the Court's effort in doing this, defendant's expert testified that he thought the ordinary housewife would prefer to use the old fashioned scrubboard instead of that machine of this 1870 patent as "the labor would be less" (GE 222-3, Finding 25, GE 37).

The trial court who saw the attempted demonstrations of each of these old machines, reconstructed to suit defendant's purpose, at the "show" (GE 175), thoroughly rehearsed and well acted, put on by defendant at the Baltimore Hotel, found that none of them embodied the Snyder invention (see illustration, GE 1839).

The trial court said of these demonstrations (GE 557):

> "The earlier contrivances, relied on by the Court of Appeals, and others, were exemplified to us by models and by actual machines. As each was operated the operation was accompanied by the testimony of a learned professor. Listening to his testimony alone (or reading it in the record) one would be forced to conclude that plaintiff's patent was an exact replica of several earlier machines. **Only when the observer withdrew his gaze from the lips of the professor and observed the machines whose operation he purported to be describing did he realize that the professor's words did not accurately describe the earlier machines and their operation.**
>
> "The truth is that these earlier contrivances did not work from a practical viewpoint and certainly not in the way disclosed in claims by Snyder. The plaintiff's machine did work, most successfully."

We respectfully call attention to the opinion of

Judge Byers (GE 831-40) and to the findings of the trial court as to the Miller, Hermance, Henin machines, and other machines shown between pages 56-57 of defendant's brief (Findings 20, 21, 22 and 24; GE 32-34, 37), for we believe they are sufficiently disposed of there as not disclosing the Snyder invention.

VII.

Defendants contend (p. 61 of their brief) **that the functional statements of the Snyder claims (26 and 29) cannot be used to distinguish them from the prior art.** We have already pointed out, both in this and in our main brief, the structural elements and the construction and arrangement specified in each by which the rapid flows of water currents are produced for suspending the clothes in the water and moving them freely about while washing them. In this connection we have pointed out the language of the claim which calls for the impeller mounted at the **bottom** of the tub for operation in a **fixed plane,** having its circumference spaced a substantial distance from the interior of the tub, and with the impeller blades of sufficient height and lateral area to secure the desired result, as clearly shown in the drawings, and called attention to the language of each claim which calls for the tub and the impeller being so **"constructed and arranged"** with respect to each other as to produce the indicated flows of water for accomplishing the stated result, and for the provision of power means by which the impeller can be rapidly oscillated to accomplish this result of the Snyder invention.

By reference to the specifications and drawings, the words "constructed and arranged," used in each claim asserted, indicate very plainly just what is meant, and the use of additional description

to show the effect of the construction and arrangement disclosed and the operation of it at high speed is desirable and cannot be treated as an objectionable functional statement. The claims are drawn in exact accordance with many of those sustained by this Court, in *Eibel* v. *Paper Co.*, 261 U. S. 45, and other cases cited in our main brief under Points V and VI (pp. 38-9). *General Electric Co.* v. *Wabash Co.*, 304 U. S. 364, cited by defendants (Brief, p. 61) is inapplicable here. Instead of a product claim lacking definite description of the constituents of the product which the patentee in that case attempted to distinguish from the prior art by a mere characterization of the result sought to be attained, the apparatus claims of the Snyder patent here asserted set forth specific elements of the mechanism together with statements descriptive of their construction and operation. The propriety of such apparatus claims was recognized by this court in *Eibel Co.* v. *Paper Co.*, 261 U. S. 45, 65, 66; *Temco Co.* v. *Apco Co.*, 275 U. S. 319, 330; *Smith* v. *Snow*, 294 U. S. 1, 12, 14, and other cases cited and discussed in our main brief (pp. 38, 39, 66-69 inc.).

Permutit Co. v. *Graver Corp.*, 284 U. S. 52 and *Howard* v. *Detroit Stove Works*, 150 U. S. 164, 167, cited by defendants at page 62 of their brief, do not apply to the Snyder patent. In those cases, the single feature of the patented structure (in the *Permutit* case, a "free" zeolite bed in a filter; in the *Howard* case, a flange in a section of a stove) upon which patentable novelty depended was not indicated in the specification or claims, nor was it apparent from the drawings even if shown in them. In the instant cases, it is quite different. The novel features of the construction and operation of the Snyder patent, including the substantial spacing between the impeller and the upwardly

extending portion of the tub, and the impeller blades of substantial height and lateral area, are clearly shown in the drawings, referred to in the specification and defined in the claims so as to be readily understood by anyone skilled in the art. This is plainly pointed out in our main brief (pp. 55-69, inc.). Defendants' criticism lacks force in view of their servile copy of the machine depicted in the patent drawings. Indeed, the same spacing between the impeller and tub and effective area of impeller blades are used in defendants' machines. (EH 294-8, 308-9; GE 144, 168.)

Defendants say (p. 63 of their brief) that the prior art is capable of attaining the stated results. This is not a fact, and both Judge Byers and Judge Otis so found after witnessing numerous demonstrations of alleged replicas of these machines produced by defendants.

Furthermore, the testimony shows that in all of these prior art machines the clothes were washed by rubbing, pounding, squeezing and dragging them through the water, as even defendants' expert admits, and if their dolly or rubboard mechanisms were rapidly reciprocated they would have mutilated the clothes attempted to be washed in them because of the severe rubbing, pounding, dragging and squeezing that would take place. It is certain that no amount of speeding up of any of these machines would secure the water action specified in any of the claims in suit while carrying out the washing of clothes in them by rubbing, dragging, pounding and squeezing them. We have already called attention to the fact, as did Judge Otis in his findings, that there is nothing in any of these patents to indicate any such operation as the Snyder machine accomplished. It is true that the speeding up of a particular device might not amount to in-

vention, but where a mechanism has such a novel construction and arrangement of parts that when speeded up it secures a novel result and one different from anything that preceded it, it is not a mere question of speeding up but accomplishing something which had never been done before. We submit that Judges Otis, and Byers and the Eighth Circuit Court of Appeals were right in so finding and holding.

VIII.

On page 69 of defendants' brief they make the far fetched argument that claim 23 is not infringed because defendants do not use a **dish-shaped impeller,** and because of the language in the claim "that each blade and its adjacent portion of the impeller base coact to drive the cleansing fluid," etc. The same contention was made before Judge Byers who held that neither claim 23 nor the other two claims in suit specify the dish-shaped impeller in terms or by implication (11 F. Supp. 743, 757). Judge Otis also held this claim infringed in the face of a similar contention. Manifestly these holdings are correct.

Claim 23 contains no language which refers to or can be said to require a limitation to a dished impeller. The specifications (Pat., p. 8, line 5) clearly means that the tub and impeller are designed to cooperate to cause in successive order the outward, upward, inward and downward flows. The specifications state (p. 3, lines 103-7) that the dish-shaped member "assists" in this movement, and that this directional flow is "augmented" by the inclined walls 48. In other words, the dish-shaped feature was regarded by the patentee as an added feature of his structure. This feature is specified in other claims and will not be read

into a claim where it is not recited. There is no excuse for reading into claim 23 an unexpressed limitation which itself is the subject of other claims. (*Smith* v. *Snow,* 294 U. S. 1, 13; *Bresnahan* v. *Tripp,* 102 Fed. 899, 900, C. C. A. 1; *O'Rourke* v. *McMullen,* 160 Fed. 933, 939, C. C. A. 2; *Ryder* v. *Schlicter,* 126 Fed. 487, 491, C. C. A. 3).

While defendants make this contention it is significant that they make no contention that defendants' structure is not of a clear equivalent of Snyder's or that it does not accomplish exactly the same result in the same way, as they each plainly do, and are claimed to do by each of the defendants in its advertising.

IX.

It is only by a complete disregard of the language of each of the claims in suit that the Second Circuit Court of Appeals said (86 F. (2d) 629) in copying substantially from defendant's brief in the Brooklyn Edison case that—

> "The machines disclosed by the prior art answer a description of claims 23 and 26 as to every necessary element and the relative proportions and arrangement of the parts."

Referring to the statements made by the defendants on pages 71-83 of their brief, we have already called attention to the fact, with respect to the asserted "fundamental" conflict between the two Circuit Courts of Appeals, that the machines made under the Davis patent are rubboard machines. We insist they clearly belong in that class and again call attention to the fact that defendants' brief fails to point out any testimony which it claims (footnote, p. 6 of their brief) supports their contention by "overwhelming weight."

Concerning the "Addendum" in defendants' brief (pp. 84-101) relative to machines made under the Davis and Doughty & Davis patents by the 1900 Company, and the evidence of priority of Snyder over the latter, we call attention to our main brief (pp. 69-82, 83-96) which, taken in connection with the findings of Judges Byers and Otis and the opinion of the Eighth Circuit Court of Appeals, should be sufficient answer.

Defendants contended in the "addendum" to their brief (p. 98) and elsewhere that the findings of Judges Byers and Otis with respect to the date of the Snyder invention is not supported by any documentary evidence, and that it is significant that plaintiff did not call John Mikulasek who is said to be familiar with that early work. We flatly deny this statement, and call attention to our main brief (pp. 83-91) which refers to the testimony and the contemporaneous records which amply support it, and the findings of both Judge Byers and Judge Otis "based upon testimony of witnesses appearing in open court" and concerning which the Eighth Circuit Court of Appeals said "An examination of this testimony convinces us that it is substantial" (100 F. (2d) 218, 223).

There is no justification for defendants' statement concerning Mikulasek, for he had made an affidavit which was filed in the Patent Office during the prosecution of the Snyder application which defendants introduced and thereby made this evidence their own and are bound by it. The Court's attention is especially called to it (GE 1545). There is nothing in the record to show that Mikulasek had any knowledge that would add to the witnesses who testified, but so far as his knowledge goes his affidavit fully supports that of the other witnesses. Had defendants thought

that Mikulasek would in any wise contradict the testimony of other witnesses, they should have called him as their own witness as they had full knowledge of his affidavit which they introduced. In these circumstances *Runkle* v. *Burnham,* 153 U. S. 216, is inapplicable.

It is submitted that decrees in Nos. 76 and 77 should be reversed and the decree in 661 should be affirmed.

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